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ADDENDUM TO NOTE

from: General Secretariat
to: Working Party on Substantive Criminal Law

No. Prop. : 11497/11 DROIPEN 61 COPEN 152 CODEC 1018

Subject : Proposal for a Directive of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest
- Compilation of replies to questionnaire

Delegations will find in the Annex the replies to the questionnaire submitted by Slovakia, to be inserted in document 5897/12 DROIPEN 8 COPEN 24 CODEC 228, page 380.

1. a) i)

Accused person has a right to choose a lawyer and consult with him also during acts executed by police authorities, prosecutor's offices and courts. Right of accused person to consult with a lawyer includes right to consult before an interview itself. If an accused person is detained, arrested or in execution of an imprisonment (prison), this person can consult with the lawyer without presence of third person during detention. This person has also the right to require that the lawyer will be present during his interview. The only exception from this rule is the situation, when the lawyer is not accessible.

NOTE: Detention is possible according Slovak law before official accusation. From the point of official accusation the person is taken into arrest. Official accusation (there must be fulfilled formal as well as substantial conditions) is an official start of pre-trial proceedings.

1. a) ii)

This right is granted in all situations except when lawyer of detained person (this person was not officially accused) is not accessible, because maximum duration of detention is 48 hours. In this time-limit detained person must be officially accused and taken before court together with the proposal on arrest or release from detention. Accused person as well as detained person (not officially accused) have always the right to remain silent during an interview and the person can not be forced to answer.

1. a) iii)

This right can not be limited only on phone contact. Slovak Criminal Code does not regulate expressly the possibility of phone advice with lawyer (except accused person, which is in execution of arrest; conditions of phone contact with lawyer are regulated by special act on execution of an arrest). Competent authorities are obliged to inform accused person about his/her rights and afford to him full possibility application of this rights. This obligation also includes the possibility of accused or suspected person, whose personal freedom is limited, to contact by phone the lawyer before an interview for the purpose of his choosing or advice.

1. b) i)

Yes. In principle the answer in point 1. a) i) with the amendment that the accused person or detained suspect has the right to the presence of lawyer during interview but the person can not to consult with the lawyer how to answer a question already asked.

1. b) ii)

From general rule that an accused person or detained suspect has the right to the presence of the lawyer during interview, are following exceptions:

- as already mentioned, interview of the detained person, not yet officially accused, may be executed without the presence of the lawyer, if the lawyer is not accessible. This option is always balanced by the right of detained person to remain silent.
- if the lawyer does not come to required procedural act, although he was informed in time, police officer shall act without his presence, except an interview of an accused person, which insists on the presence of the lawyer. It follows that the interview of accused person can be executed without the presence of the lawyer, except the situation that the accused person does not insist on its presence.
- about an interview of the accused person, in case of decision-making of his arrest, the judge informs except other persons also the lawyer. If the lawyer is not accessible, accused person can be interviewed before deciding of his/her arrest without his presence of the lawyer. The accused person has the right to remain silent also in this case.
- accused person or detained person, who was not officially accused, can not consult during interview with the lawyer how to answer the question already asked.

1. c) i)

Yes. As it was aforementioned, police authorities, prosecutor's offices and courts shall always inform accused persons about his/her rights and afford him full possibility for application of these rights.

1. c) ii) – first bullet

This obligation exists in all cases, where an accused person wants to choose a lawyer, but even if the accused person does not want to choose a lawyer, but there is a reason for mandatory defense on the side of accused person. The accused person must have a lawyer, in case he is in an arrest, in execution of imprisonment or under observation in a medical institution; this rule applies also in cases when the accused person is deprived of legal capacity or his legal capacity is limited, it is going about the proceedings related to serious crimes, it is a proceedings against a juvenile, it is a proceedings against escaped person (in absentia of this person, but this proceedings has special conditions), if the court considers and in pre-trial proceedings prosecutor or police officer to be necessary mainly therefore that they have doubt about the competence of the accused person to defend themselves appropriately, it is extradition proceedings of foreigner from the Slovak Republic, it is proceedings, in which is decided on the imposition of protection measure (kind of sentence according Slovak law), except the treatments related to against alcoholism and against drugs. If the accused person has no lawyer in cases where this person has to have a lawyer, there is set a time for choosing of the lawyer. If within this period a lawyer will not be chosen, lawyer must be appointed without delay. Lawyer shall be appointed and withdrawn in the pre-trial proceedings by judge for pre-trial proceedings and in proceedings before court by chairman of the panel of judges. The accused person may at any time instead of the lawyer of his choice, chose another lawyer.

1. c) ii) – second bullet

Specific steps depend on the circumstances of the case. In relation to the accused person is necessary to distinguish two main situations:

a/ accused person (or detained suspect) wants to choose the lawyer - in this case, the competent authorities shall allow to the accused person to contact the lawyer and to allow the choice of the lawyer (in practice the first contact is mostly by phone);

b/ accused person does not want to choose a lawyer, but there is the reason for the mandatory defense - in this case police officer asks judge for the pre-trial proceedings for appointment of the lawyer for the accused person; in cases, which can not be postponed (the periods of detention), there is necessary an agreement with the lawyer, whether he can provide legal assistance.

1. d) i)

Yes, this obligation results from the Criminal Procedural Code of the Slovak Republic. Police officer can not make the interview of the accused person without the presence of the lawyer, if the accused person insists on his presence. Interview of the detained persons, which was not officially accused, can be made without the presence of the lawyer, if the lawyer is not accessible. This option is always balanced with the right of detained person to remain silent.

1. d) ii)

The precise time limit is not set. This time limit depends on the circumstances of the case and the consideration of the police officer. It is necessary to find a balance between the rights of the accused person for real and appropriate defense and the need not to destroy already executed acts in criminal proceedings.

1. e) i)

Interview of the detained persons, which was not officially accused, can be made without the presence of the lawyer, if the lawyer is not accessible. This option is always balanced with the right of the detained person to remain silent. The right for legal aid of the lawyer for the accused person can not be denied, because his interview can not be made without the presence of a lawyer, if the accused person insists on his presence. On the other hand, the sense of this right in absolute terms could be no obstruction of investigation, therefore the provisions of the Criminal Procedural Code enables to appoint substitute lawyer for the accused person also for his pre-trial proceedings, if the accused person insists on the presence of the lawyer and there is the fear that the interview of the accused person from the side of the lawyer might be denied.

1. e) ii)

No exhaustive list of these situations exists, the response in paragraph 1. e). i) is relevant.

2.

Slovak law does not regulate the formal notification of suspicion. The specific mode that is nearly identical to the mode of the rights of the detained person, which was not officially accused. Rights of this person were already mentioned in point 1. of the questionnaire. From this reason point 2. of the questionnaire is relevant only to the accused person, which personal freedom is not limited, but this person was invited for interview. The person is formally informed about accusation. From this point the person is in the procedural status of the accused person and can apply all rights, which the accused person according to the Criminal Procedural Code has, including the right to choose the lawyer.

2. a) i)

The accused person has the right to choose the lawyer and consult with him prior to his/her interview, as well as during the interview.

2. a) ii)

This right is always granted to the accused person.

2. a) iii)

It is necessary to distinguish two situations:

a/ there is no reason for the mandatory defense by accused person - in this case, the summons to the accused to the interview does not contain the information that the accused person can choose the lawyer. The accused person is informed about all of their rights before first interview. If the accused person wants to choose the lawyer, police officer allows him/her that and in interview continues after choosing of the lawyer.

b/ there is a reason for the mandatory defense by accused person - in this case the accused person is informed about this circumstance in the decision on accusation (sent via post or delivered personally) and the accused person has time limit for choosing the lawyer. In case the accused person does not choose in this time limit the lawyer, judge for pre-trial proceedings appoints the lawyer to the accused person.

2. b) i)

Yes.

2. b) ii)

This right is granted to the accused person always with the limitation that the accused person during the interview can not consult with the lawyer how to answer on the question already asked.

2. b) iii)

The accused person has always the right to choose the lawyer and the right to consult with the lawyer before the interview itself, as well as during the interview. Information about the rights of the accused person is in point 2. a) iii).

2.c) i)

Yes. As aforementioned, police authority, prosecutor's office and court are always obliged to inform the accused person about his/her rights and provide him/her full possibility to apply them.

2. c) ii)

- This obligation exists in all cases where the accused person wants to choose the lawyer and also in cases if the accused person does not want to choose the lawyer, but there is the reason for the mandatory defense.

- Specific steps depend on the circumstances of the case. It is necessary to distinguish two main situations on the side of the accused person:

a/ the accused person (or detained suspect) wants to choose the lawyer - in this case, the competent authorities shall allow the accused person to contact the lawyer and to allow choosing of the lawyer (in practice the first contact is mostly by phone);

b/ accused person does not want to choose a lawyer, but there is the reason for the mandatory defense - in this case police officer asks judge for the pre-trial proceedings for appointment of the lawyer for the accused person; in cases, which can not be postponed (the periods of detention), there is necessary an agreement with the lawyer, whether he can provide legal assistance.

2. d) i)

Yes, this obligation results from the provisions of the Criminal Procedural Code. Police officer can not execute interview without presence of the lawyer, if the accused person insists on the presence of the lawyer.

2. d) ii)

The precise time limit is not set. This time limit depends on the circumstances of the case and the consideration of the police officer. It is necessary to find a balance between the rights of the accused person for real and appropriate defense and the need not to destroy already executed acts in criminal proceedings.

2. e) i)

The right for legal aid of the lawyer for the accused person can not be denied, because his interview can not be made without the presence of a lawyer, if the accused person insists on his presence. On the other hand, the sense of this right in absolute terms could be no obstruction of investigation, therefore the provisions of the Criminal Procedural Code enables to appoint substitute lawyer for the accused person also for his pre-trial proceedings, if the accused person insists on the presence of the lawyer and there is the fear that the interview of the accused person from the side of the lawyer might be denied.

2. e) ii)

No exhaustive list of these situations exists, the response in paragraph 2. e). i) is relevant.

3.

Slovak legal order does not assume that the interview of the persons suspected or accused of committing a crime will be executed "on street", although the legal order does not exclude the possibility of executing of the interview in reasonable and appropriate cases out of official rooms.

Suspected person can be detained, even if this person was not officially accused. In this case proceeds as indicated in point 1. of this questionnaire. If the accused person was taken for an interview "from the street" (because the summons failed, the accused person was hiding, etc.), there is no reason to ask the accused person any question. Questions will be asked to him in the frame of interview after taking the accused person for interview. In this case will apply the approach mentioned in answers in point 1. of the questionnaire. When answering questions in point 3. of the questionnaire, we will assume that the interview of the accused person is executed after that this person is brought before the competent authority.

3. a)

The interview after brought by the accused person is executed according to identical procedural rules as for his summons. The accused person should be asked particularly questions related to the criminal offence of which the person is accused.

3. b) i)

Yes.

3. b) ii)

This right is granted to the accused person always with the limitation that the accused person can not consult the lawyer during the interview how to answer the question already asked.

3. b) iii)

This right can not be limited only on phone contact. Slovak Criminal Code does not regulate expressly the possibility of phone advice with lawyer (except accused person, which is in execution of arrest; conditions of phone contact with lawyer are regulated by special act o execution of an arrest). Competent authorities are obliged to inform accused person about his/her rights and afford to him full possibility application of this rights. This obligation also includes the possibility of accused or suspected person, whose personal freedom is limited, to contact by phone the lawyer before an interview for the purpose of his choosing or advice.

3. c) i)

Yes. As aforementioned, police authority, prosecutor's office and court are always obliged to inform the accused person about his/her rights and provide him/her full possibility to apply them.

3. c) ii)

- This obligation exists in all cases where the accused person wants to choose the lawyer and also in cases if the accused person does not want to choose the lawyer, but there is the reason for the mandatory defense.

- Specific steps depend on the circumstances of the case. It is necessary to distinguish two main situations on the side of the accused person:

a/ the accused person (or detained suspect) wants to choose the lawyer - in this case, the competent authorities shall allow the accused person to contact the lawyer and to allow choosing of the lawyer (in practice the first contact is mostly by phone);

b/ accused person does not want to choose a lawyer, but there is the reason for the mandatory defense - in this case police officer asks judge for the pre-trial proceedings for appointment of the lawyer for the accused person; in cases, which can not be postponed (the periods of detention), there is necessary an agreement with the lawyer, whether he can provide legal assistance.

3. d) i)

Yes, this obligation results from the Criminal Procedural Code of the Slovak Republic. Police officer can not make the interview of the accused person without the presence of the lawyer, if the accused person insists on his presence.

3. d) ii)

The precise time limit is not set. This time limit depends on the circumstances of the case and the consideration of the police officer. It is necessary to find a balance between the rights of the accused person for real and appropriate defense and the need not to destroy already executed acts in criminal proceedings.

3. e) i)

The right for legal aid of the lawyer for the accused person can not be denied, because his interview can not be made without the presence of a lawyer, if the accused person insists on his presence. On the other hand, the sense of this right in absolute terms could be no obstruction of investigation, therefore the provisions of the Criminal Procedural Code enables to appoint substitute lawyer for the accused person also for his pre-trial proceedings, if the accused person insists on the presence of the lawyer and there is the fear that the interview of the accused person from the side of the lawyer might be denied.

3. e) ii)

No exhaustive list of these situations exists, the response in paragraph 3. e). i) is relevant.

Obtaining of evidence and investigation acts in pre-trial proceedings

4. Issues relating to the taking of evidence and investigative measures in pre-trial

4. a) i)

Yes. Police officer can allow also the participation of the accused person in investigative acts as well as to ask questions to the witnesses interviewed. Police officer proceeds this way especially if the accused person has no lawyer and an act consists on interview of the witness, in which is reasonable assumption that the act will not be possible to execute in court proceedings only if the assurance of presence of the witness or presence of the witness could jeopardize the execution of this act.

4. a) ii)

Lawyer has the right to participate on all acts whose outcome may be used as evidence in trial proceedings (interview of witnesses, inspection, recognition, reconstruction, investigative experiment, etc.) from official accusation.

4. b) i)

Yes.

4. b) ii)

Yes, this obligation results from the Criminal Procedural Code of the Slovak Republic. Police officer can not make the interview of the accused person without the presence of the lawyer, if the accused person insists on his presence.

4. c) i)

If the lawyer was informed of the act in time and despite this fact the lawyer does not appear on execution of investigative act, investigative act can be executed also in case, if the lawyer excuses from the execution of an act (conflict with any other act). There is no explicit legal obligation to change the date of execution of an act and accommodate this date to the lawyer. There should be balance between obligation of the authorities to create possibilities to full application of rights of the accused persons and continuation in investigative acts without presence of the lawyer. In practice this means, that if that circumstances of the case permit, the police officer connects with the lawyer by phone before important particularly unrepeatable acts and agrees the date of execution of an act with the lawyer.

4. c) ii)

Although it is not prescribed by law, if the lawyer by phone informs the police officer that he is in traffic jam and will be delayed for a short time (15 to 30 minutes), the police office waits for him with execution of the act, if circumstances of the case allow that.

4. d) i)

Yes.

4. d) ii)

Exhaustive list of these situations exist. Lawyer's right to participate on investigative act may be denied when it is going on execution of an act, which can not be postponed (urgent and unrepeatable acts) and the lawyer is informed about execution of this act. It is not permissible participation of the lawyer on the operation of information-technical means and means of operative-investigating activities (interception, agent, controlled delivery). These means are mainly used, if there is no official accusation and the lawyer was not yet appointed. If such means are used in criminal proceedings (also in stage after official accusation), they are in a regime of secrecy under relevant legal acts.

Hearing of persons in pre-trial, which originally were not considered suspects or accused of a crime, but during the hearing is to receive such a procedural status

5. a)

Slovak law distinguishes between the terms "advocate" and "lawyer". The lawyer is profession. Advocate is a lawyer representing the accused person in criminal proceedings. The accused person can have the lawyer (Criminal Procedural Code of the Slovak Republic uses special term "obhajca"). Criminal Procedural Code regulates only rights the lawyer as a representative of the accused person and does not regulate rights of advocates and citizens in general. Therefore the relevant provisions of the Criminal Procedural Code does not regulate rights of other persons as the accused person for the assistance of the lawyer. This rule is stated in the Constitution of the Slovak Republic - everyone is entitled to legal aid in trial proceedings, other state authorities or public authorities from the beginning of the proceedings, and under the conditions provided for by law. Although the law does not specify under what conditions the right of witness on the lawyer, the Constitutional Court of the Slovak Republic has repeatedly decided that this rule is applicable also on witnesses.

5. b)

Yes. If there is a reasonable conclusion that the witness committed criminal offence, to which witness is interviewed, police officer officially accuses the witness and the witness takes the procedural position of the accused person. His interview is finished without delay and the person is subsequently interviewed again, already in the procedural position of the accused person. Only in case that the official accusation significantly impedes explanation of the criminal offence of corruption, criminal offence of establishing, plotting and supporting a criminal group, criminal offence of establishing, plotting and supporting a terrorist group or criminal offence committed by an organized group, criminal group or terrorist group, the criminal offence of premeditated murder or finding the offender of this criminal offence, the police officer with the prior consent of the prosecutor for the necessary time limit temporarily defer official accusation for such criminal offence, or for another criminal offence to person who is significantly involved in clarifying some of these criminal offences or finding of the offender. Temporarily deferred official accusation is not possible against the organizer, instigator or orderer of the criminal offence in which clarification is this person involved.

5. c) i)

If there is a reasonable conclusion that the witness committed the criminal offence, to which is interviewed, police officer officially accuses this person without delay, except the aforementioned exception. From this point the witness is in procedural position of the accused person.

5. c) ii)

In the way of the notification of the decision on official accusation, which must be officially delivered.

5. c) iii)

Interview of witnesses shall be promptly terminated and after official accusation a new interview starts as an interview of the accused person, which is informed about his/her rights before the interview.

5. c) iv)

As mentioned in answer to the question in point a), the witness has the right to legal assistance of the lawyer at the interview. Since being officially accused the accused person has a right to assistance of an advocate in procedural position of a lawyer.

5. c) v)

No. There are even opinions that the interview of a witness who was later officially accused, would not even be a part of an investigative file and should be removed from it.

Less serious offenses

6. a)

No. The right to assistance of an advocate (lawyer) is awarded to each person officially accused from committing of criminal offence.

A lawyer by the State / Reimbursement of defense costs

7. a) i)

Yes.

7. a) ii)

The accused person (not a detained person who was not officially accused), who does not have sufficient means to cover the costs of defense and requests for appointment of a lawyer, judge pre-trial proceedings or judge presiding to the penal appoints the lawyer, although there are not reasons for mandatory defense. The fact that the accused person has sufficient resources, the accused person must prove within 30 days after this person received measure of appointment of the lawyer, otherwise this appointment will be canceled. The accused person may instead of the lawyer, which was appointed to him/her, appoint another lawyer. Of these rights must be the accused person informed.

As regards the situations referred to in point 1. to 4. of this questionnaire, the accused person shall always have the right not to be interviewed without the presence of his lawyer.

7. b) i)

No. Such an obligation is determined only to the accused person who does not have sufficient means to cover the costs of defense.

The principle of confidentiality

8. a)

In a case where the lawyer represents the accused person, confidentiality must always be guaranteed. If the accused person communicates with the lawyer during operation of information-technical means, this way gathered evidence/information can not be used for the purposes of criminal proceedings and must be destroyed without delay according appropriate provisions of law. Principle of confidentiality does not apply in relation to information not related to a case in which the advocate represents the accused person as a lawyer.

8. b)

If, for example, during transcription of an electronic record of the use of information-technical means determines that the accused person communicated with his lawyer, and their communication is related to another criminal offence, other than criminal proceedings for which the lawyer represents him, and this act is not connected with the relevant criminal proceedings, this way gathered evidence/information is not confidential. With regard to the written correspondence of the accused person (who is in prison for example) with the lawyer, in such correspondence can be viewed at all. If for example the correspondence between the accused person and the lawyer was given to the police authorities or prosecutor's office by witness alleging that it concerns an act other than in criminal proceedings where the accused person is represented by the lawyer or was represented, those parts of the confidential correspondence should not be confidential.

Waiver

9. a)

In answering this question is again necessary to distinguish two situations:

A/ If there is a reason for mandatory defense:

In this case, there can be no waiver of the right to legal aid of the lawyer. Whether the accused person (and similarly detained person, which was not officially accused) chooses lawyer, this is the question of the will of the accused person. The accused person can always choose the lawyer, but on the other hand, the accused person can not be forced to have an lawyer. The accused person can choose the lawyer at any stage.

B/ If there is no reason for mandatory defense:

Generally, the accused person can not waive the right to mandatory defense, except the case that the only reason for mandatory defense is that the accused person is prosecuted for a serious criminal offence. It means for the criminal offence for which the law provides the imprisonment at least ten years. In this case, the accused person can waive the mandatory defense only after first consultation with the lawyer, who must be appointed to the accused person. If the accused person waives this right, appointment of the lawyer will be canceled.

9. b) i)

The accused person must be informed that there is a reason for mandatory defense, as well as about the possibility to waive the right to mandatory defense. This right to mandatory defense can be waived only after first consultation with the lawyer appointed for this occasion.

9. b) ii)

- This information must provide the state authority, which first interviews the accused person, usually the police investigator.

- The information are provided during informing of the accused person of the rights, what is recorded in the report from the interview, with the participation of the lawyer. The accused person is always asked if understands the rights to understand what the accused person confirms by signing of the report.

9. b) iii)

Waiver of mandatory defense must be provided expressively in that way that about this will not be any doubts. For these reasons, the waiver of rights must take either a written declaration of intent of the accused person with the handwritten signature or oral expression to the report of the police authority, prosecutor's office or court in the presence of lawyer.

9. b) iv)

Yes.

- Yes.

- No. Change of the decision of the accused person does not cause retroactive effects. The acts, executed after an explicit statement of waiver of the right to mandatory defense till withdrawal of this statement, need not be repeated.

9. c)

Yes. There is always the reason for the mandatory defense because of the age of the juvenile (juvenile accused person, which was officially accused before the age of the 18). Right to mandatory defense of such person can not be waived. To waive of the mandatory defense can only the accused persons, which is prosecuted for a serious criminal offence and there is no reason for mandatory offense.

Remedies

10. a)

Yes.

10. b i)

During the investigation the accused person always has the right to ask the prosecutor to review police procedure. The prosecutor can impose a binding instruction to a police officer to execute an evidence, which was obtained illegally, again. Also in cases where the evidence was executed without the participation of lawyer and for such a procedure were not fulfilled legal requirements. Generally, in the proceedings of ordinary and extraordinary remedies can always be applied as a reason for the unlawful decision, breach of the right of the accused person, including the unlawful executing of the evidence without the presence of lawyer.

10. b ii)

Yes, the court can not take into account the evidence obtained unlawfully, for example breach of the right for defense of the accused person.

General considerations concerning the proposed directive

11.
